NO. 41133-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES PHILLIP DOUGLAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 04-1-5-86-5

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On November 1, 2004, the State charged JAMES DOUGLAS, hereinafter "defendant," with one count of arson in the first degree, alleged to be an act of domestic violence. CP[1] 1-3. On May 11, 2005, the State added counts of residential burglary and violation of a court order by way of an amended information. CP 844-847. The amended information also added to the arson and burglary charges allegations of the aggravating factor of domestic violence where "one or more of the following was present: (i) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; (ii) the offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or (iii) the offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the

[1] Citations to the clerk's papers will be to "CP." Due to the length of the trial and the number of courtrooms involved in this case, the verbatim report of proceedings is only partially numbered sequentially. In an attempt to provide maximum clarity, the State will refer to the verbatim report of proceedings as "RP," followed by the date of the hearing referenced. For example, the jury returned its verdict at RP (8/17/10) 2110-11.

victim AND/OR the offense involved an invasion of the victim's privacy AND/OR the offense was committed shortly after the defendant was released from incarceration[.]" CP 884-847.

This case was consolidated with a case involving assault charges against the same victims in an unrelated incident. CP 35-60. Defendant was found guilty as charged. CP 35-60. In an unpublished opinion, Division II of the Court of Appeals upheld the convictions on the assault case but remanded the current case for a new trial on the basis of ineffective assistance of counsel. CP 35-60.

On December 1, 2008, defendant presented a motion to represent himself. RP (12/1/08) 3. The court granted the motion and appointed standby counsel. RP (12/1/08) 16. At that time, the State notified defendant that it would be seeking an exceptional sentence. RP (12/1/08) 4-15.

The case was called for trial on June 30, 2009. RP (6/30/09) 1. The case ultimately ended in a mistrial when defendant informed the court he was unable to continue the trial due to being assaulted in the jail. *See* RP (7/17/09) 240-41, 247-48; RP (7/20/09) 257-58.

On August 4, 2009, the State entered a motion for defendant to undergo a mental health evaluation based on pleadings he entered in unrelated civil cases where he claimed that the head injury he received in

the jail was more substantial than what he indicated in the criminal case, and that he received the injury as part of a plot between the State and Department Assigned Counsel (DAC). *See* RP (8/4/09) 4-6. The court granted the State's motion. RP (8/4/09) 35-36. The Western State evaluation indicated that defendant was competent to stand trial and represent himself. RP (8/24/09) 1-2.

On August 27, 2009, defendant's standby counsel requested that DAC be relieved as standby as defendant was not appropriately utilizing the service. RP (8/27/09) 17-19. Defendant had no objection. RP (8/27/09) 19. The court granted the motion to relieve DAC as defendant's standby counsel. RP (8/27/09) 24.

On September 29, 2009, defendant indicated his wish to sue DAC in federal court because the investigator assigned to him was not providing the information he wanted. RP (9/29/09) 43. The investigator appeared in court and made a record of all of the information she provided to defendant. RP (9/29/09) 45-50. Defendant did not refute the investigator's statements, but stated that his case was mismanaged and he only wanted to speak to a federal investigator to investigate the injustice of his case. RP (9/29/09) 51. Defendant requested a "pro bono attorney from a different county" to assist him in his defense. RP (9/29/09) 53. Defendant stated that he wanted an attorney appointed. RP (9/29/09) 54.

On October 8, 2009, the DAC conflict counsel who had been appointed to defendant's case requested a continuance in order to interview witnesses and review the substantial discovery in the case. RP (10/8/09) 60-62. The court granted the continuance over defendant's objection. RP (10/8/09) 62.

On December 28, 2009, defendant's attorney had to withdraw from the case as he was leaving the DAC conflict position. RP (12/28/09) 3-4. The following day, a new attorney was appointed for defendant. RP (12/29/09) 2.

On February 19, 2009, counsel moved to continue the trial until May, 2010. RP (2/19/09) 3-4. Counsel was concerned about a video deposition of one of the State's witnesses that was taken to preserve testimony while the witness was deployed for military service. RP (2/19/09) 3-4. The video deposition was taken while defendant was representing himself and counsel was concerned about the level of cross-examination performed by defendant. RP (2/19/09) 3-4. The court granted the continuance over defendant's objection. RP (2/19/09) 6.

On May 4, 2009, defendant moved to dismiss the case for speedy trial violations and counsel made a motion for a 10.77 competency evaluation for defendant. RP (5/4/09) 3-4. The court denied the motion to

dismiss and granted the motion for a competency evaluation. RP (5/4/09) 9. Defendant stated that he wanted to fire his attorney. RP (5/4/09) 9.

On May 19, 2010, the court determined that defendant was competent based on the mental health evaluation. RP (5/19/10) 12. On May 26, 2010, defendant indicated that he believed his counsel was "not representing [him] fully." RP (5/26/10) 4. Defendant indicated that he wanted to represent himself, but have his attorney appointed as standby counsel. RP (5/26/10) 5-6. Defendant wished to represent himself because he had been through numerous attorneys and there had been ineffective assistance of counsel. RP (5/26/10) 15. Defendant informed the court that he was aware that he would be unable to claim ineffective assistance of counsel in this case if he represented himself. RP (5/26/10) 15. The court urged defendant to reconsider his motion, but ultimately granted the motion to proceed pro se. RP (5/26/10) 16, 20. The court did not appoint standby counsel. RP (5/26/10) 20-21.

The case was called for trial on June 10, 2010, before the Honorable Brian Tollefson. RP (6/10/10) 28. Prior to jury selection, defendant indicated he wished to enter a change of plea and wanted an attorney to represent him. RP (6/16/10) 249-50. The court reappointed defendant's prior DAC conflict counsel to advise him on changing his plea. *See* RP (6/16/10) 252, 259-63. Defendant later clarified that he

wished to enter an ***Alford***[2] plea on the charges, but have a jury trial as to the aggravating factors. RP (6/17/10) 5. Defendant refused to sign the plea paperwork however; believing that his offender score was miscalculated. RP (6/17/10) 6-8. Defendant ultimately did not change his plea. RP (6/17/10) 18.

On August 17, 2010, the jury found defendant guilty as charged. RP (8/17/10) 2110-13. The parties proceeded to the aggravator phase of the trial the following day. RP (8/18/10) 2119. Defendant argued that he did not receive adequate notice that the State was going to argue for an exceptional sentence because he was not given an exceptional sentence at his first trial, that deliberate cruelty was inherent in the crime of arson, that he provided himself constitutionally ineffective assistance of counsel during his second trial, and that there should have been a suppression motion regarding weapons at his first trial. RP (8/18/10) 2122-41. Defendant requested counsel for the aggravating phase as he believed it was only his status as a pro se that resulted to the guilty verdict. RP (818/10) 2140-41. The court denied his request for an attorney because defendant's colloquy indicated that he would not be willing to allow his appointed attorney to make tactical decisions in his case. RP (8/18/10) 2146-54.

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[2] ***North Carolina v. Alford***, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

Defendant then requested an "evidentiary hearing to establish whether or not there is a need for the continuance of the case[.]" RP (8/18/10) 2155. Defendant claimed he had not been given discovery and that the jury was tainted by hearing the evidence in the guilt phase of the trial. RP (8/18/10) 2155. The court denied his request for another hearing and defendant indicated that he would no longer participate in the remainder of the case. RP (8/18/10) 2156.

The court took a recess from which defendant did not return. RP (8/18/10) 2160. Jail staff informed the court that defendant refused to come to the proceeding. RP (8/18/10) 2160. The court ordered jail staff to bring defendant into the courtroom. RP (8/18/10) 2161. When defendant appeared, he refused to answer the court's questions. RP (8/18/10) 2162-65. The court found that defendant voluntarily chose to absent himself from the proceeding. RP (8/18/10) 2165-66. Defendant did not appear for the remainder of the aggravator phase of the trial. RP (8/19/10) 2218, 2223, 2238. The jury found that the arson was committed against family or household members and that it was part of an ongoing pattern of psychological, physical, or sexual abuse of the victims, manifested by multiple incidents over a prolong period of time, that the crime manifested deliberate cruelty or intimidation of the victim, and that the crime invaded the victims' zone of privacy. RP (8/19/10) 2240-41.

The jury also found that the residential burglary was committed against family or household members and that it was part of an ongoing pattern of abuse and manifested deliberate cruelty. RP (8/19/10) 2241-42.

Defendant called witnesses for his sentencing for mitigation purposes. RP (8/26/10) 2290, 2303. The State requested an exceptional sentence of 540 months. CP 743-49; RP (8/26/10) 2319; RP (8/27/10) 2374. Defendant argued that the merger doctrine applied to all of the convictions and that the prosecutor engaged in vindictiveness for seeking an exceptional sentence. RP (8/26/10) 2330-32. Defendant also argued that deliberate cruelty was an inherent part of arson and that the jury instructions improperly relieved the State of its burden of proof. RP (8/27/10) 2350-51. The court imposed an exceptional sentence of 480[3] months. CP 798-810; CP 811-817; RP (8/27/10) 2377.

Defendant filed a timely notice of appeal. CP 155.

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[3] Defendant had an offender score of 5 on the arson charge, giving him a standard range of 46-61 months, and a maximum sentence of life in prison. CP 798-810. Defendant had an offender score of 4 for the remaining convictions, giving him a standard range of 15-20 months on the burglary, and 22-29 months on the violation of a protection order. CP 798-810. The court sentenced defendant to 360 months for arson and 120 months for burglary, each to run consecutive to the other. CP 798-810. The court sentenced defendant to 29 months for the violation of the protection order, to run concurrent with the other counts. CP 798-810.

2. Facts

In 2004, defendant's ex-wife, Debra Douglas, was living with her daughter at her parents' house located at 12109 212th Avenue Court East in Sumner, Washington. RP (7/12/10) 807-08. On the morning of October 10, 2004, Ms. Douglas, her parents Carroll and Pauline Pederson, and three of her daughters went to the 9:30 service at their church. RP (7/12/10) 809. They took two cars to transport everyone to the church, but everyone left at essentially the same time. RP (7/12/10) 811. Ms. Douglas' daughter was the last one out of the house that morning, but Ms. Douglas ensured that the door was shut and locked. RP (7/12/10) 810. There was no smell of gasoline in the house. RP (7/12/10) 813. After the church service, Ms. Douglas took her daughters shopping for some clothes. RP (7/12/10) 814-15. She returned around 11:30 a.m. to find her parents home in flames. RP (7/12/10) 815. The following day, Ms. Douglas was able to enter the house and she found that her baby's crib had been saturated with gasoline that had not ignited in the fire. RP (7/12/10) 816.

The court admitted a photograph that Ms. Douglas identified as being a picture of defendant's truck into evidence. RP (7/12/10) 807; EX 1. Defendant owned that vehicle the entire time that Ms. Douglas knew him. RP (7/12/10) 807.

Ms. Pederson testified that after church she and her husband ran some errands and then drove home to find their home on fire. RP (7/6/10) 361-62. There was extensive damage done to the home and its contents. RP (7/6/10) 364-71.

Defendant had assaulted the Pedersons during a child custody exchange in July 2004. RP (7/6/10) 352. As a result of the assault, defendant was prohibited from having contact with the Pedersons or from coming to their residence. RP (7/6/10) 358; EX 48.

Kyle Bullock lived at 12211 212th Avenue East in Sumner, near the Pedersons. RP (7/8/10) 667. On October 10, 2004, he was in his back yard talking on the telephone when he heard an explosion. RP (7/8/10) 669. When he looked in the direction of the source of the sound, he saw debris flying. RP (7/8/10) 669. He walked over to his fence to get a better view and saw a white truck with a matching white canopy take off out of the gravel alleyway. RP (7/8/10) 669. He described the truck as "interesting" because it had a crew cab, which was unusual because he had never seen a smaller-sized truck with four doors. RP (7/8/10) 670. He testified that the canopy matched the truck body in color and height so that the top of the canopy was level with the top of the cab. RP (7/8/10) 670. Mr. Bullock got a brief look at the license plate and recalled that there might have been an "A" or a "2" or an "O" in the license plate. RP

(7/8/10) 670. Mr. Bullock was shown a photograph of defendant's truck:

> Q Handing you what's been marked as Exhibit Number 1, does the vehicle that appears in Exhibit Number 1 resemble the vehicle that you observed that morning?
>
> A. Correct. Full-sized trucks usually have a straighter big hood, and these have - - like the Ranger style. They're smaller and they kind of slope down a little bit like the smaller trucks do. Plus with the matching white canopy that looks flush across the top.

RP (7/8/10) 671. Mr. Bullock also testified that in his experience of working on cars, the flush canopy was unique. RP (7/8/10) 671. After seeing the truck, Mr. Bullock noticed flames coming out the front of the house and called 911. RP (7/8/10) 671-72.

Jennifer Vaughn lived next door to the Pedersons at 12101 212th Avenue Court East, Sumner, Washington. RP (7/12/10) 710. She was at her home on the morning of October 10, 2004, about to let her dog inside, when she heard an explosion coming from her neighbors' house. RP (7/12/10) 712-13. At the time of the explosion, Ms. Vaughn noticed a white truck going by her home, traveling too fast for the neighborhood. RP (7/12/10) 713-14.

Ms. Vaughn ran to the yard to see what had caused the explosion and saw the Pederson house up in flames. RP (7/12/10) 713. She called 911 to report the fire. RP (7/12/10) 713. She and another neighbor,

Terrence Murphy, used her garden hose to try to put the fire out. RP (7/12/10) 720.

Terrence Murphy testified[4] that he was a next door neighbor to the Pedersons and was at his home on October 10, 2004. RP (6/28/10) 8, 13. The Pederson property was on a dead end street, and Mr. Murphy generally kept an eye on traffic that was coming and going in the neighborhood. RP (6/28/10) 12. As he was preparing to attend an 11:00 service at his church, his two St. Bernards started barking vigorously. RP (6/28/10) 13. Mr. Murphy noticed a white pickup truck leaving the area traveling faster than vehicles normally travel on the gravel roads. RP (6/28/10) 15-16. Mr. Murphy noticed a fire coming out of the window of the Pederson house. RP (6/28/10) 14. He ran outside to help another neighbor try to contain the fire with a garden hose. RP (6/28/10) 17.

Timothy McGee, another neighbor of the Pederson's, was in his home at the time of the explosion. RP (7/14/10) 926. He looked out his window and saw flames coming out of the home and a light colored pickup truck leaving the area. RP (7/14/10) 926-27.

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[4] The parties agreed to preserve Mr. Murphy's testimony through video as he was scheduled for a medical procedure during the trial. RP (6/28/10) 5. The video was played for the jury on July 13, 2010. RP (7/13/10) 884.

Robert Skaggs, a deputy Fire Marshall and certified fire investigator, testified that he responded to the fire at 12109 212th Avenue Ct. East in Sumner on October 10, 2004. RP (7/7/10) 466. When he arrived, he saw that the front window of the house had been blown into the front yard and that there were cushions and drapery material against a fence that was across the street from the house. RP (7/7/10) 467, 470. At the back of the house, he observed insulation that had been blown out of the attic and a broken window, consistent with an explosion. RP (7/7/10) 468. Mr. Skaggs also noticed a truck parked next to the house, with its gas cap open and a stick placed into the gas tank opening. RP (7/7/10) 468, 471-72.

Once the firefighters ventilated the house, Mr. Skaggs began his investigation. RP (7/7/10) 473. Upon entering the house through the laundry room, he noted an intense odor of gasoline. RP (7/7/10) 474. He discovered gas can spouts and caps in the garage and laundry room and several empty cans of gasoline inside the residence. RP (7/7/10) 474-75, 489, 479. Mr. Skaggs also noticed cardboard on the laundry room floor, leading into an interior hallway. RP (7/7/10) 475. There were stick matches on the floor near the cardboard, and Mr. Skaggs believed this was a make-shift timing device to give the arsonist time to leave the house before the explosion. RP (7/7/10) 476, 508. , 48, 56, 73-76. After

completing his investigation, Mr. Skaggs determined that the origin of the fire was due to a flammable liquid being poured in a contiguous pattern throughout the house and ignited by the cardboard and stick matches. RP (7/7/10) 488, 508. Mr. Skaggs determined that this was an intentionally set arson fire. RP (7/7/10) 510.

Mary Lou Hanson -O'Brien, a forensic investigator for the Pierce County Sheriff's Department, was dispatched to the Pederson's home on October 10, 2004. RP (7/15/10) 1100. She walked through the scene with Deputy Fire Marshall Skaggs before documenting the fire scene with both video and photographs. RP (7/15/10) 1100-14. Ms. Hanson-O'Brien looked for likely places for the retrieval of latent fingerprints, but was not expecting much success as fingerprints are comprised of approximately 95% water which is evaporated in the heat of a fire or be destroyed by the water introduced by the fire department. RP (7/19/10) 1135, 1138-39. Despite efforts to recover latents from several objects, she retrieved only one partial print off of a nozzle from the garage but it was of no value for comparison purposes. RP (7/19/10) 1138-40.

Detective John Sample[5] was assigned to assist the arson investigation of the Pederson's home. RP (9/1/09) 15-16. Through the course of his investigation, he learned that defendant was a possible suspect for this arson. RP (9/1/09) 16. He learned that defendant drove a white Ford Explorer, which he described as a "little sport track truck," consistent with the vehicle displayed in Exhibit 1. RP (9/1/09) 18, 21-22. On October 25, 2004, he found defendant's truck parked behind defendant's parents' house. RP (9/1/09) 22. By the time Detective Sample returned with a warrant to search the truck, it had been repossessed. RP (9/1/09) 22-23.

Deputy Heath Page of the Pierce County Sheriff's department testified as to his efforts to locate the defendant and his truck on October 14 and 15, 2004. RP (7/3/10) 898-900. His efforts included speaking to defendant's parents at their Maple Valley home on October 15, 2004, and informing them that he was looking for the defendant and his truck. RP (7/13/10) 902. The defendant's truck was not at that residence on the 15th of October. RP (7/13/10) 902. On October 20th, Deputy Page received a call from defendant's mother, telling him that defendant was in Pasco,

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[5] Detective Sample was deployed to Iraq during the course of the trial. RP (8/277/09) 13. The parties agreed to preserve his testimony by video deposition. RP (9/1/09) 15. The video of Detective Sample's testimony was played to the jury on July 13 and 14, 2010. RP (7/13/10) 919; RP (7/14/10) 1004.

Washington. RP (7/13/10) 903. Deputy Page called the Pasco Police Department, confirmed that there was a warrant for defendant's arrest, and informed them of defendant's whereabouts. RP (7/13/10) 904.

Jeri Christy, an employee of the Washington State Department of Licensing, testified that that there were four white Ford Explorer pick up trucks, model years 2001 to 2004, and with a license number beginning with "A2," registered in Pierce County, Washington. RP (7/19/10) 1156-57. One of those vehicles was registered to defendant. RP (7/19/10) 1158.

Defendant presented the testimony of City of Pasco Police Officer Corey Smith. RP (7/20/10) 1315. Officer Smith arrested defendant in Pasco, Washington on October 20, 2004. RP (7/20/10) 1315. Defendant was driving a tan colored Dodge Caravan at the time he was arrested. RP (7/20/10) 1315. Officer Smith was unaware of the Franklin County jail's policy on inmates with cell phones, but he has seen people booked using their cell phones before. RP (7/20/10) 1328. Officer Smith never saw defendant use his cell phone at the jail. RP (7/20/10) 1328.

Defendant also called Jacquelyn Gray, an employee[6] at Qwest Wireless. RP (7/20/10) 1337. She provided defendant certified copies of telephone records. RP (7/20/10) 1337-38. The phone records showed

calls made to Maple Valley, Seattle, and Auburn between 6:00 p.m. and 7:00 p.m. on October 20, 2004. RP (7/20/10) 1342-44. There were also several calls between October 10 and October 20, 2004. RP (7/20/10) 1350-51. On October 10, 2004, at 12:48 p.m., the phone received a call from Auburn while it was in the Yakima, Washington roaming area. RP (7/20/10) 1355-56. There was no way to determine where the cell phone was inside that roaming area when the call was made. RP (7/20/10) 1356.

On October 25, 2004, David Handschin, a repossessor for the Howe Adjustment Service, repossessed defendant's truck. RP (8/10/10) 1595-96. Mr. Handschin testified that the truck appeared to have been sitting for a while, but not long enough that the grass had grown around the tires. RP (8/10/10) 1598. The interior of the truck had been wiped down and cleaned up. RP (8/10/10) 1608.

Defendant also presented testimony from Evelyn Root that he was out of the office several days in August and on family medical leave from September 1 to 24, 2004. RP (8/10/10) 1682-86.

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[6] Ms. Gray appeared by telephone, by stipulation of the parties. RP (7/20/10) 1285-86.

C. ARGUMENT.

1. THE TRIAL COURT HAD STATUTORY AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE WHERE THE JURY FOUND THAT THE STATE HAD PROVED THE AGGRAVATING FACTORS BEYOND A REASONABLE DOUBT AT A BIFURCATED TRIAL.

A trial court may impose a sentence outside the standard range if it finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.537(6). Any fact that increases the penalty for a crime beyond the prescribed statutory maximum, besides the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. ***Blakely v. Washington***, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); ***State v. Hagar***, 158 Wn.2d 369, 373, 144 P.3d 298 (2006) (citing ***Apprendi v. New Jersey***, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)). Once the jury has found the factual basis for an aggravating factor beyond a reasonable doubt, the court has discretion to determine whether that finding is sufficiently substantial and compelling to justify an exceptional sentence. *See* ***State v. Hale***, 146 Wn. App. 299, 306, 189 P.3d 829 (2008) (citing ***State v. Suleiman***, 158 Wn.2d 280, 209-91, 143 P.3d 795 (2006). A court may impose an exceptional sentence based on a jury's finding that the crime committed involved

domestic violence which was either part of an ongoing pattern of abuse or that the defendant's conduct manifested deliberate cruelty or intimidation of the victim. RCW 9.94A.535(h)(i), (iii).

The Legislature enacted RCW 9.94A.537 in 2005 to comply with the United States Supreme Court's decision in ***Blakely***. *See* Laws of Washington 2005 c 68 § 1. Under RCW 9.94A.537(4)[7], evidence of aggravating factors must be presented to the jury during the trial of the alleged crime, unless the aggravating circumstance is an allegation of domestic violence and was part of an ongoing pattern of abuse. Where the evidence of the aggravating factor is not part of the res geste of the underlying crime, is not otherwise admissible, and if the probative value is substantially outweighed by its prejudicial effect, the court may conduct a separate proceeding immediately following the trial on the underlying conviction. RCW 9.94A.537(4) and (5). The remedial jury trial procedure proscribed by RCW 9.94A.537 "applies to all sentencing proceedings held since [the statute] was signed into law ... on April 15, 2005 ... where trials have not begun or guilty pleas accepted." ***State v. Pillatos***, 159 Wn.2d 459, 465, 480, 150 P.3d 1130 (2007).

Here, defendant's case was called for trial June 10, 2010. RP (6/10/10) 28. He was found guilty as charged on August 17, 2010. CP

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[7] Originally RCW 9.94A.537(3); recodified in 2007. *See* Laws of Washington 2007 c 205 § 2.

699, 700, 701; RP (8/17/10) 2110-13. Immediately following defendant's conviction, the State presented evidence of the aggravating factors. RP (8/18/10) 2119. The jury found that defendant's crimes of arson in the first degree and residential burglary were acts of domestic violence, that they were part of an ongoing pattern of abuse, and that he manifested deliberate cruelty toward Carroll Pederson, Pauline Pederson, and Debra Douglas. CP 738-39, 741-42. The jury also found that the crime of arson in the first degree was an invasion of the victims' privacy. CP 740; *see also* RCW 9.94A.535(p). The court found substantial and compelling reasons, based on the jury's finding of the aggravated factors, to impose an exceptional sentence. CP 811-817. The trial court acted within its discretion when it imposed an exceptional sentence based on the jury's finding of aggravating factors.

Defendant claims that his exceptional sentence is not statutorily authorized because he did not receive an exceptional sentence at his first trial, and RCW 9.94A.537(2) only allows the court to impanel a jury to consider aggravating factors where an exceptional sentence was improperly imposed and the case is remanded for resentencing. *See* Brief of Appellant at 9-14. Defendant's argument is without merit as he was not resentenced. Defendant's *convictions* for arson, burglary, and protection order violation were vacated and those charges were remanded for an

entirely new trial. Nothing in RCW 9.94A.537 indicates that an offender's sentence after retrial is limited to a prior sentence invalidated by a vacated conviction.

The trial court properly imposed an exceptional sentence when it found substantial and compelling reasons to deviate from the standard range, based on a jury's finding of aggravating factors.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO REAPPOINT AN ATTORNEY DURING THE AGGRAVATING FACTORS STAGE OF DEFENDANT'S BIFURCATED TRIAL WHEN DEFENDANT MADE A KNOWING AND VALID WAIVER OF HIS RIGHT TO COUNSEL.

The United States Supreme Court recognizes a constitutional right of criminal defendants to waive assistance of counsel and to represent themselves at trial. In ***Faretta v. California***, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975), the rule was announced that a court cannot force a defendant to accept counsel if the defendant wants to conduct his or her own defense, as the Sixth Amendment grants defendants the right to make a personal defense with or without the assistance of an attorney.

"To protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation, we require a defendant's request to proceed in propria persona, or pro se, to be unequivocal." ***State v. DeWeese***, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). The pro se defendant does not have

an absolute right to standby counsel and there is no right to 'hybrid representation,' such as a pro se defendant serving as co-counsel with his attorney. ***DeWeese***, 117 Wn.2d at 379; ***State v. Bebb***, 108 Wn.2d 515, 524, 740 P.2d 829 (1987).

While criminal defendants have a right to assistance of counsel, a defendant who has validly waived that right has relinquished the right to demand assistance of counsel as a matter of entitlement. ***DeWeese***, 117 Wn.2d at 376-77. Thus, whether a motion for reappointment should be granted is within the discretion of the trial court. ***DeWeese***, 117 Wn.2d at 376-77; ***State v. Canedo-Astorga***, 79 Wn. App. 518, 525–27, 903 P.2d 500 (1995). In exercising that discretion, the trial court may consider all of the circumstances that exist when a request for reappointment is made. ***Canedo-Astorga***, 79 Wn. App. at 525. These standards are designed, in part, to protect the trial court and the integrity of the criminal justice system from manipulative vacillations by a defendant wishing to disrupt or delay trial. ***DeWeese***, 117 Wn.2d at 376.

The trial court's discretion to grant or deny a motion to proceed pro se lies along a continuum that corresponds with the timeliness of the request. ***State v. Modica***, 136 Wn. App. 434, 443, 149 P.3d 446 (2006).

> If the request is made well before trial, the right exists as a matter of law. If the request is made shortly before trial, the existence of the right depends on the facts of the case with a measure of discretion reposing in the trial court. If made during trial, the right rests largely in the informed discretion of the trial court. These rules apply with equal force to a

> request for reappointment of counsel. The burdens imposed upon the trial court, the jurors, the witnesses, and the integrity of the criminal justice system increase as trial approaches or when trial has already commenced. Thus, the degree of discretion reposing in the trial court is at its greatest when a request for reappointment of counsel is made after trial has begun.

Modica, 136 Wn. App. at 443-44 (internal citations omitted).

Here, defendant does not contend that he did not act knowingly, voluntarily and intelligently when, before trial, he chose to proceed without counsel. Because his initial waiver of counsel was valid, the trial court had discretion to grant or deny his request for reappointment.

Nor did the trial court abuse its discretion by denying the request for reappointment. The request was made in the midst of a jury trial. Defendant clearly was suffering from "buyer's remorse," as it was only after the jury found him guilty as charged that defendant decided that he was ineffective at representing himself. *See* RP (8/18/10) 2140. Defendant informed the court that he would need assistance for the aggravating factors phase of the trial, but he was equivocal as to whether he was requesting standby counsel or appointed counsel. RP (8/18/10) 2140. Defendant's colloquy with the court indicates that he believed it was only his own ineffectiveness that resulted in the guilty verdicts, that he was still in the best position to represent himself, and that it was only

the Department of Assigned Counsel's inadequacies in providing him resources that undermined his own ability to represent himself. *See* RP (8/18/10) 2146-54.

The court was initially concerned that appointing counsel at this stage of the proceeding would require a continuance. RP (8/18/10) 2145. However, after considering the fact that defendant had twice been granted permission to represent himself and had a history of refusing to relinquish tactical control of his case to an attorney, the court wanted to ensure that defendant would actually accept the appointment of counsel. *See* RP (8/18/10) 2146. The judge asked defendant three times if he was willing to allow an attorney to take tactical control of his case. RP (8/18/10) 2146, 2149, 2150. Each time defendant's response avoided answering the question presented, yet his answers suggested that he was unwilling to accept an attorney's tactical decisions, unless they conformed to his own ideas. *See* RP (8/18/10) 2146-54. The court ultimately denied defendant's request for counsel because it was "pretty clear by your continuing discussion with the Court here that you want to call all the shots, so we're going to proceed with that." RP (8/18/10) 2155. As defendant's responses indicated that he still expected to put forth his own case, the court did not abuse its discretion when it denied defendant's request to appoint counsel in the midst of trial.

3. DEFENDANT WAIVED HIS CHALLENGE TO THE JURY INSTRUCTIONS WHERE HE DID NOT MAKE A TIMELY OBJECTION AT TRIAL.

With respect to jury instructions, objections must be timely and well stated in order that the trial court may have the opportunity to correct any error. ***State v. Scott***, 110 Wn.2d 682, 684-85, 757 P .2d 492 (1988); CrR 6.15(c). Where the defendant fails to offer an instruction or object, no error can be predicated on the failure of the trial court to give an instruction, unless the error is of constitutional magnitude. ***State v. Parker***, 97 Wn.2d 737, 742, 649 P.2d 637 (1982); ***Scott***, 110 Wn.2d at 686.

Ordinarily, failure to timely object waives the claim on appeal. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). This is so even with respect to instructional errors. *See*, ***State v. Williams***, 159 Wn. App. 298, 312-13, 244 P.3d 1018 (2011). The failure of a trial court to further define an element is not a constitutional violation. ***State v. Gordon***, ___ Wn.2d ___, 260 P.3d 884 (2011); ***State v. O'Hara***, 167 Wn.2d, 91, 105, 217 P.3d 756 (2009); ***Scott***, 110 Wn.2d at 689-91.

Here, defendant chose to waive his right to be present in the courtroom during the aggravator phase of his trial. RP (8/18/10) 2156, 2160-62, 2165; RP (8/19/10) 2218, 2222-23. He was informed that the State would be presenting jury instructions. *See* RP (8/18/10) 2164. He presented no objections or exceptions to the State's proposed instructions,

nor did he submit his own proposed instructions. *See* RP (8/19/10) 2224. Defendant raised his first objection to the jury instructions after the jury returned the special verdicts. RP (8/23/10) 2269; RP (8/27/10) 2350. Because the omission of a definition is not a constitutional violation, defendant was required to make a timely objection in order to preserve his claim. Defendant's objection was not timely; therefore he waived any claim of error.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT BASED ITS DETERMINATION OF DEFENDANT'S EXCEPTIONAL SENTENCE ON THE JURY'S FINDING THAT THE DEFENDANT ENGAGED IN A PATTERN OR PRACTICE OF ABUSE.

RCW 9.94A.535(3)(h)(i) permits a court to impose an exceptional sentence if the jury determines that the offense involved domestic violence and "[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." Where a reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing. ***State v. Jackson***, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) (citing ***State v. Gore***, 143 Wn.2d 288, 321, 21 P.3d 262

(2001); ***State v. Cardenas***, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (affirming sentence while invalidating two of three aggravators)).

Here, defendant claims that the trial court improperly imposed an exceptional sentence based on the jury's finding of deliberate cruelty. Brief of Appellant at 31-34. Yet the record shows that the court based its decision for imposing an exceptional sentence on the jury's finding of domestic violence that was part of an ongoing "pattern of psychological and physical abuse established by multiple incidents relating to each victim identified by the jury." CP 811-817 (Finding of Fact VIII). The court reiterated that its imposition of an exceptional sentence was based solely on the ongoing pattern of abuse. CP 811-817 (Finding of Fact X). Defendant does not challenge these findings, nor does he challenge the jury's determination that the ongoing pattern of abuse existed. *See* CP 738-39, 741-42. As the court did not base its decision to impose an exceptional sentence on the jury's finding of deliberate cruelty, defendant's argument fails.

a. Even if this Court finds that the trial court based defendant's exceptional sentence on the jury's finding of deliberate cruelty, the record shows that defendant's conduct went beyond the malice ordinarily associated with the crime of arson.

A jury may find a domestic violence aggravator if the defendant's "conduct during the commission of the current offense manifested

deliberate cruelty or intimidation of the victim." RCW 9.94A.535(3)(h)(iii). Deliberate cruelty is "gratuitous violence, or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." ***State v. Copeland***, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996) (quoting ***State v. Scott***, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993)). "The conduct must be significantly more serious or egregious than typical in order to support an exceptional sentence. It must involve cruelty of a kind not usually associated with the commission of the offense in question." ***State v. Faagata***, 147 Wn. App. 236, 249, 193 P.3d 1132 (2008) (citations omitted).

In ***State v. Goodman***, 108 Wn. App. 355, 364, 30 P.3d 516 (2001), there was sufficient evidence that the defendant's arson manifested deliberately cruelty or intimidation of the victim. Goodman not only burned down the house he shared with his wife, but he also purposefully killed her dog in the process. The court concluded that "Goodman did more than destroy community property. Intending to cause emotional harm, he destroyed her home and killed her pet." ***Goodman***, 108 Wn. App. at 361.

In ***State v. Pockert***, 53 Wn. App. 491, 493, 768 P.2d 504 (1989), Division Three reversed an exceptional sentence imposed on a defendant who burned his ex-girlfriend's house shortly after they separated. Although the trial court found he manifested deliberate cruelty in part because he was "extremely agitated because of the breakup of the

relationship and was getting even with [the victim]," Division Three held that Pockert's vengefulness was not deliberately cruel, given that arson has an element of malice covering "an evil intent, wish, or design to vex, annoy, or injure another person." ***Pockert***, 53 Wn. App. at 497.

In ***State v. Tierney***, the trial court imposed an exceptional sentence for the crime of arson based on the court's finding that the crime involved deliberate cruelty. The Court of Appeals upheld the sentence, because the court had focused on the defendant's ongoing harassment of the victim and her parents both before and after the arson. ***State v. Tierney***, 74 Wn. App. 346, 872 P.2d 1145 (1994). Tierney stole personal items from the victim, inscribed a defaming and derogatory phrase about her on the wall of her apartment, threatened to kill the victim and her parents, threatened to set fire to her parents' home, and sent numerous unwanted letters and phone calls. ***Tierney***, 74 Wn. App. at 355. The court held that the defendant's cruel conduct was an integral part of the circumstances surrounding the arson. ***Tierney***, 74 Wn. App. at 353-54.

Here, as in ***Tierney*** and ***Goodman***, defendant's conduct went beyond the malice or cruelty usually associated with arson. The defendant poured gasoline throughout the house, but particularly soaked his own child's crib. RP (7/12/10) 816. The amount of gasoline present in the house was sufficient to blow out the wall of the house in the bedroom. RP (7/7/10) 479-80. This behavior suggests that defendant intended to cause emotional harm to the child's mother and grandparents as well as the harm

of having their belongings and home destroyed. When combined with defendant's accusations that the elderly Pedersons were actively provoking defendant's violence acts against them, his systematic destroying of Debra's property, and his accusations that the Pedersons set fire to their own house merely to frame him, defendant's behavior went beyond the mere malice that is ordinarily present in the crime of arson.

5. DEFENDANT'S CONVICTIONS FOR ARSON AND VIOLATION OF A COURT ORDER WERE NOT PART OF THE SAME CRIMINAL CONDUCT.

Whenever a person is to be sentenced for two or more current offenses, the court determines the sentence range for each current offense by counting all other current and prior convictions as if they were prior convictions for the purpose of the offender score. RCW 9.94A.589(1)(a). If the court enters a finding that some or all of the current offenses encompass the same criminal conduct, then those current offenses shall be counted as one crime. RCW 9.94A.589(1)(a). 'Same criminal conduct' means 'two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.' RCW 9.94A.589(1)(a); ***State v. Tili***, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), *aff'd by* 148 Wn.2d 350 (2003). The absence of any one of the three elements prevents a finding of same criminal conduct. ***State v. Lessley***, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Washington courts

narrowly construe the statute to disallow most assertions of same criminal conduct. ***State v. Price***, 103 Wn. App. 845, 855, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014, 22 P.3d 803 (2001).

A trial court's determination about same criminal conduct is reviewed for abuse of discretion or misapplication of law. ***State v. Maxfield***, 125 Wn.2d 378, 402, 886 P.2d 123 (1994) (citing ***State v. Elliott***, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)). The trial court abuses its discretion when it acts unreasonably or for untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Review for abuse of discretion is a deferential standard; but, review for misapplication of law is not. ***State v. Freeman***, 118 Wn. App. 365, 377, 76 P.3d 732 (2003).

a. <u>The crimes of violation of a protection order and arson in the first degree did not involve the same victim.</u>

Here, the court made no explicit findings about the three prongs of same criminal conduct. Nevertheless, the facts in the record show that the crimes of arson and violation of a protection order did occur on the same day and in the same location. Yet the record also shows that the crimes did not involve the same victim. Carroll and Pauline Pederson were the only people named on the protection order. Ex 48. But defendant burned down not only the Pederson's residence, but also the residence of Debra Douglas and Alyssa Douglas. *See* RP (7/12/10) 807.

The fact that there is some overlap in victims does not meet the criteria for same victim. For example, in ***State v. Lessley***, 118 Wn.2d 773, 778-79, 827 P.2d 996 (1992), the Supreme Court refused to treat a burglary and a kidnapping as the same criminal conduct. The court reasoned that while the kidnapping victim was also a victim of the burglary, the burglary involved additional victims- her parents with whom she lived; therefore the victims of the two crimes were not the same. *Id.*

b. The crimes of violation of a protection order and arson in the first degree do not involve the same criminal intent.

In addition, the crimes did not share the same criminal intent. The defendant's intent is crucial in a same criminal conduct analysis. ***State v. Adame***, 56 Wn. App. 803, 810, 785 P.2d 1144 (1990). In this context, we look at the offender's objective criminal purpose in committing the crime. ***Adame***, 56 Wn. App. at 811. The relevant inquiry is to what extent did the criminal intent, viewed objectively, change from one crime to the next. ***State v. Tili***, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Where sexual assaults were interrupted by a brief period of time that allowed the defendant to cease his criminal activity or form the intent to commit another crime, they were sequential rather than continuous and constituted separate offenses. ***State v. Grantham***, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). But where three rapes were continuous, uninterrupted, and

committed within a two-minute period, the defendant's intent did not change and his crimes constituted the same criminal conduct. ***Tili***, 139 Wn.2d at 124-25, 985 P.2d 365.

A person commits the crime of violation of a court order when he or she knows of the existence of a protection order and willfully violates a provision of the order excluding the person from the residence. RCW 26.50.110(1) ("Whenever an order is granted ... and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a [crime]."); *see also* CP 665-67 (Jury Instruction 25). Conversely, "a person commits the crime of arson in the first degree when he or she knowingly and maliciously causes a fire or explosion that is manifestly dangerous to any human life including firefighters." RCW 9A.48.020(a); *see also* CP 665-67 (Jury Instruction 13).

Defendant completed the crime of violating a protection order when he went to the Pederson's residence. After that crime was completed, he then set fire to the Pederson's house. No one saw defendant arrive or observed how much time elapsed between his arrival and the explosion. The record does show that, some time after his arrival, defendant poured gasoline inside the house. There was a temporal break after defendant completed the first crime where he got out of his truck and entered the house, giving him time to form a new criminal intent to commit the second offense. Defendant had ample time after violating the

protection order to cease his criminal activity and leave, or to form the intent to burn down the house.

As the crimes of violation of a protection order and arson in the first degree have different victims and involve different criminal intents, the crimes are not the same criminal conduct.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court affirm defendant's convictions and the exceptional sentence imposed by the trial court.

DATED: November 21, 2011.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.22.11
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